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IN THE

Supreme Court of the United States

October Term, 1968

Clifford M. Hardin, Secretary of Agriculture,
Petitioner,

v.

Russell Allen, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS RUSSELL ALLEN, *ET AL.*, IN OPPOSITION

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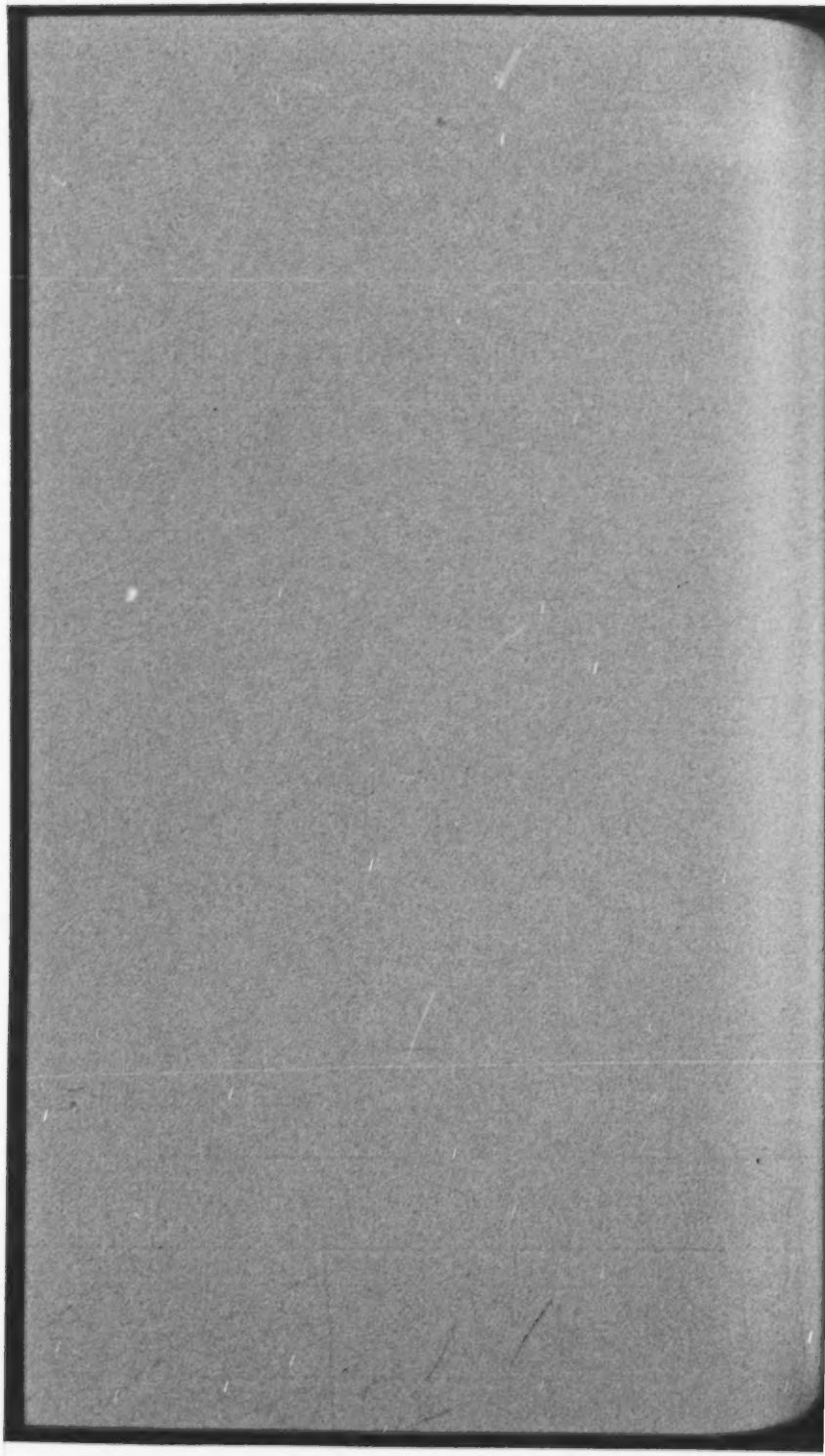

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATUTE INVOLVED	2
STATEMENT	3
ARGUMENT	13
I. There Is No Important Unsettled Federal Question Or Conflict In Circuits, And The Decision Below Is Correct	13
CONCLUSION	32

CITATIONS

Cases:

Baldwin v. Seelig, 294 U.S. 511 (1935)	6, 30
Blair v. Freeman, 370 F.2d 229 (1966)	10, 21, 22, 24, 27, 32
Brannan v. Stark, 342 U.S. 465	14, 25
Cranston v. Freeman, 290 F.Supp. 785	19, 28, 29
Dean Milk Co. v. Madison, 340 U.S. 349	30
Grant v. Benson, 229 F.2d 765, *cert. denied* 350 U.S. 1015	10
Green Valley Creamery v. United States, 108 F.2d 342 (1939)	24-26, 28

Page

H.P. Hood & Sons v. United States,
26 F.Supp. 672, affirmed
307 U.S. 588, 59 S.Ct. 1019 . . . . . 22, 25, 26

Hood & Sons v. DuMond,
336 U.S. 525 30

Kass v. Brannan,
196 F.2d 791, *cert. denied*
344 U.S. 891 29

Knudsen Bros. Dairy v. Freeman
303 F.2d 886 29

Lehigh Valley Co-op. Farmers v. United States
370 U.S. 76 . . . . . 10, 11, 29

Nebbia v. New York,
291 U.S. 502 (1934) 6, 16

N. Y. State Guernsey Breeders Assoc. v. Wickard,
141 F.2d 805, *cert. denied,*
323 U.S. 725 18-21

Panama Refining Co. v. Ryan,
293 U.S. 388 (1935) 25

Polar Co. v. Andrews,
375 U.S. 361 30

Schechter Poultry Corp. v. United States,
295 U.S. 495 . . . . . 25, 30

Stark v. Wickard,
321 U.S. 288 (1944) 11, 24, 26

United States v. Rock Royal,
26 F.Supp. 534, 307 U.S. 533 (1939) 26-27

United States v. Whiting Milk Co.,
21 F.Supp. 321, 306 U.S. 629,
affirmed 307 U.S. 588 22

Page

Agricultural Marketing Agreement Act of 1937, as amended:

7 U.S.C. 601 *et seq.* 3, 7, 18
Sec. 608c (5) 7
Sec. 608c (5)(A) 8, 10, 26
Sec. 608c (5)(B)(i) 9
Sec. 608c (5)(B)(ii) 9, 12, 14
Sec. 608c (5)(C) 10
Sec. 608c (5)(D) 11, 12
Sec. 608c (5)(B)(ii)(a) 8, 28
Sec. 608c (5)(B)(ii)(c) 8, 28
Sec. 608c (11) 17
Sec. 608c (18) 17

Code of Federal Regulations
7 C.F.R. 1001.72 . . . . . 3, 4

Federal Register:

22 F.R. 4213 . . . . . 15, 17
23 F.R. 8238 21
24 F.R. 1049, 1063 20
25 F.R. 7833 20
29 F.R. 11205, 11208, 11213 . . . . . 4, 24

Miscellaneous:

Brooks, *The Pricing of Milk Under Federal Marketing Orders* 5, 15

1954 *Yearbook of Agriculture*, USDA, Marketing Div. 5

HR Rep. No. 1241, 74th Cong., 1st Sess. 8 (1935) 26

Sen. Rep. No. 1011, 74th Cong., 1st Sess. 8 (1935) . . . 26

H.R. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess. 5 (1934) 6

79 Cong. Record 11140 17

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OPINION BELOW

The opinion of the Court of Appeals is reported at 402 F.2d 660 and is set forth at pages 1-29a of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby farm location differential provision, 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required

under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

4. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

STATUTE INVOLVED

The statute involved, the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, is set forth in detail in the Appendix to the respondents'

brief in opposition to the brief *amicus curiae* of the State of Connecticut in No. 861.

STATEMENT

The respondents are 168 Vermont dairy farmers who have brought this action against the Secretary of Agriculture for themselves, individually, and for the benefit of all other dairy farmers similarly situated in the States of Vermont, Maine and New Hampshire, and whose farms are so located as to render them ineligible for the "nearby farm location differential" payments of the Massachusetts-Rhode Island federal milk order. Their complaint requested a judgment declaring the invalidity of the differential provision of the Order, 7 C.F.R. 1001.72, as well as an injunction against the future enforcement of such differential provision by the Secretary. The District Court granted their motion for summary judgment, and it subsequently entered an order which awarded the requested relief.

The judgment of the District Court was appealed by 7 "nearby" producers who were allowed to intervene in the case after judgment when it appeared that the Secretary was not going to take an appeal. The Secretary thereafter appealed, however, and both cases were heard by the court of appeals on a consolidated basis, the judgment of the District Court being unanimously affirmed on September 23, 1968. The petitioners in No. 861, the 7 nearby producers, filed their petition herein on December 20, 1968, but the Secretary of Agriculture was granted an extension of time of sixty days to determine whether a petition should be filed on his behalf. Such a petition was filed on February 20, 1969.

The Massachusetts-Rhode Island milk order is one of approximately 75 federal milk orders which regulate the handling or marketing of milk in the various regional marketing areas throughout the United States. It was promulgated by the Secretary effective October 1, 1964 under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, and is presently in effect. The present Order consolidated the former federal orders regulating the

handling of milk in the Greater Boston, Worcester, Springfield and Southeastern New England marketing areas, the latter order having encompassed the entire State of Rhode Island and a substantial part of southeastern Massachusetts. The Secretary's Decision in respect to the issuance of the consolidated Order is found at 29 Federal Register 11205, and the pertinent parts thereof are set forth in Appendix B, together with pertinent excerpts from the Decisions promulgating the four former milk orders which were consolidated into the present one.[1]

The differential provision of the order, Sec. 1001.72, provides that producers whose farms are located within Rhode Island and part of Connecticut and in certain enumerated towns, cities and counties in specified New England states, primarily Massachusetts, shall be paid a differential of 46 cents per hundredweight for their milk, over and above the uniform price, "unless the addition of 46 cents gives a result greater than the Class I price" at the plant at which the milk is received, in which event "there shall be added a rate which will produce that price." Subsection (b) provides for a differential of 23 cents cwt. or such lesser sum as will equal the Class I price to producers whose farms are located in another similarly enumerated preferential area, both the "nearby" and "intermediate" producers being referred to as "nearby" producers herein.

The monies to pay the differential to nearby producers are deducted from the marketwide equalization pool prior to computation and announcement of the monthly uniform price by the Market Administrator. Such deductions necessarily reduce in corresponding amount the uniform price which respondents would otherwise receive for their milk except for such nearby differential provision. (29 Fed. Reg. 11213) The nearby differential exists in only one other order (Connecticut) out of about 75 federal orders in the United States.

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[1] The Appendix referred to herein is appended to the respondents' brief in opposition to the brief *amicus curiae* filed in No. 861 for the State of Connecticut.

Initially it should be noted that there are certain problems inherent in the marketing of milk which necessitated the passage of State and Federal legislation for the regulation of the dairy industry. Milk is a highly perishable product which does not lend itself to leisurely bargaining on an offer and acceptance basis. It is a fertile field for bacteria, and considerable investment is required by all dairy farmers for the purchase of equipment and the maintenance of sanitary health standards. Cows give more milk from April through August than they do in the remaining months of the year, but the size of the herd must be maintained the entire year in order that sufficient milk is available in the period of shorter supply, the variance in production thus creating a surplus of milk in the flush season of the year. The consumer demand for milk is rather constant the entire year, but a reserve supply of milk to meet daily fluctuations and unexpected contingencies in demand for fluid or drinking milk is also necessary.[2]

The surplus milk which cannot be used for fluid purposes is manufactured into such dairy products as butter, cheese, ice cream, powdered milk and other less perishable milk products. These milk products, referred to as surplus or manufactured milk, must compete in the market with other like products from distant areas of the country, due to the very fact of their non-perishability, and they consequently return a lower margin of profit than the higher-priced fluid milk.

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2 "Although there is a pronounced seasonal variation in the production of milk, milk consumption is about the same in all months subject, however, to daily fluctuation which requires the industry to carry an operating reserve of approximately 20 percent." (USDA, Marketing Division, 1954 *Yearbook of Agriculture*, 477; see also, Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 Geo. Wash. L.R. 180 (1958). The maintenance of such reserve during the short season results in a much greater surplus during the flush production season.

The competition for fluid milk outlets became so intense in the early 1930's that milk wars, violence, and depressed milk prices were the inevitable result. The situation was seen by most handlers or dealers as a golden opportunity to exploit the helpless dairy farmer, their tendencies in this regard being related in many of the early cases. Kickbacks and rebates by the dairy farmers to the handler with a high fluid milk outlet or utilization were often a prerequisite to the retention of such fluid milk outlet, and excessive hauling charges by such handlers constituted a common practice.

In the five-year period ending December 31, 1933, prices to dairy farmers fell more than fifty percent, although the handlers were still able to make a net profit on their investment of more than twenty-five percent.[3] The problem of surplus milk and the resultant cut-throat competition for fluid milk sales could not be solved by the cooperative associations to any appreciable degree and their efforts ultimately collapsed completely.

The enactment of regulatory legislation concerning the handling of milk by the State of New York was upheld by the Supreme Court in *Nebbia v. New York,* 291 U.S. 502 (1934), but almost immediately thereafter the Court held in the case of *Baldwin v. Seelig,* 294 U.S. 511 (1935) that the State had no power to regulate and control the sale of milk produced without its borders. This decision rendered largely ineffective the State regulation of the handling and marketing of milk, and it prompted the Congress to meet the disastrous national problem by the enactment of the Agricultural Adjustment Act, which was re-enacted in and and amended as the Agricultural Marketing Agreement Act of 1937, hereinafter referred to as the "Act." The Congressional answer was a program that provided for the sharing of the benefits (fluid or Class I use) and the burdens (surplus or Class II use) of the market by all dairy farmers through

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[3] House of Rep. Concurrent Resolution No. 32, 73rd Cong., 2nd Sess., May 14, 1934, directing the FTC to investigate the milk industry.

the medium of a uniform price, irrespective of the use made of the milk of a particular dairy farmer or a group of milk producers.

The Congress was necessarily aware that a few producers, through circumstances or good fortune, might have a preferential price position with a handler who disposed of most of his milk for fluid or Class I use. But it was also totally aware of the entire chaotic conditions in all markets and of the necessity for such few producers to give up any transitory price preference that they might have in order that a sound foundation might be formulated for a program that would stabilize marketing conditions, raise the income of all dairy farmers, improve the national economy and credit structure, and inure in other respects to the common good of consumers and producers alike.

The Act confers certain enumerated powers upon the Secretary of Agriculture, and its purpose is to raise farmer income and to establish and maintain such orderly marketing conditions as will provide, in the interests of producers and consumers, an orderly flow of the supply to market. *Sec.* 601, 602.

In general, Section 608c(5) of the Act authorizes the Secretary to issue regional orders regulating the handling of milk in the various marketing areas throughout the United States. Only specifically enumerated terms and conditions *and no others* are authorized to be placed into the milk orders by the Secretary. The Secretary is empowered to set up a system of price-fixing whereby milk is classified according to the form or the purpose for which it is used, and each such use classification of milk is assigned a price that is computed from certain formulas determined by the Secretary:

> "608c (5) Milk and its products; terms and conditions of orders.
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others*:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers and associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

Milk used or disposed of by the handler for fluid purposes is classified as Class I and is assigned the highest price because it returns a greater price and profit to the handler. Surplus or manufactured milk is classified as Class II and is assigned a lower price, not because the milk is any different from that used for fluid use, but only because it brings a lower return to the handler when disposed of in such form or for such purpose.[4]

All handlers regulated under the Order are required to pay the same *minimum* prices fixed for each use classification of milk, and they are also required to make monthly reports to the Market Administrator for the particular marketing region concerning their respective sales of milk in each use classification at the minimum prices set by the Secretary for each use of milk. In order to avoid the self-defeating competition for fluid milk outlets, the total sales in each use category at the respective minimum prices are computed by the Market

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[4] This system of classified pricing was initiated by cooperative associations but the prices to dairy farmers varied all over the milkshed because of the different plans in effect, one farmer often being unaware of the price received by other neighboring producers.

Administrator for each handler[5] and then for all handlers, the total being divided by the amount of all milk sold during the month to arrive at a marketwide uniform "blended" price. The Act requires that all producers be paid such uniform "blended" price for their milk irrespective of how it was used by the handler to whom it was delivered:

> "(ii) for the payment to *all* producers and associations of producers delivering milk to *all* handlers of uniform prices for *all* milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;"

Since some handlers dispose of most of their milk for fluid or Class I use, and therefore at an overall monthly return in excess of the market's uniform price, they are required to pay such excess into a Producers Settlement Fund maintained by the Secretary's Market Administrator. Those handlers who dispose of their milk for primarily surplus or manufactured use are entitled to withdraw those monies from the Fund *in order that they may be able to pay their producers the uniform price,* the Class II price necessarily being lower than the marketwide uniform "blend" price. In this way, all handlers pay for milk according to the value of the same to them, and all producers are thereby enabled

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[5] The Act also authorizes individual-handler pools, whereby all producers delivering to the same handler receive a uniform price contingent upon the average use made of their milk by the handler. Individual-handler pools are only appropriate in markets where milk is in short supply and where it is disposed of primarily in fluid form. Such type pooling must also be approved by at least three-fourths of the producers serving the market, and this must be done in a separate referendum on this issue alone. (608c(5)(B)(i), set forth in Pet., pp. 2-3). Although individual-handler pooling is inconsistent with marketwide pooling, the Congressional objective of uniformity is evident by the aforesaid restrictions on the institution of such type of pooling, and the Secretary specifically found that individual-handler pooling would create disorderly marking in New England and injure both producers and consumers. Additionally, the same adjustments to the uniform price are authorized under both types of pooling.

to be paid the required uniform price for their milk, irrespective of how it was used by the particular handler to whom it has been delivered.

The Act clearly provides for such an arrangement in subsection 8c(5)(C):

> "(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection."

It is as if all of the regulated milk produced in the milkshed was placed in a giant pool from which the handlers procured their supplies, paying for the same according to the purpose for which they sold the milk, the payments then being divided up in such a manner that each producer received the same uniform price for his milk in the pool, none of which can be distinguished from the milk of any other producer. This is the true concept of marketwide pooling, and the Producers Settlement Fund, with its system of debits and credits for the individual account of each regulated handler, is the device for effectuating such marketwide pooling or equalization of payments.

A very clear description of the purpose and manner of operation of a marketwide equalization pool, which also illustrates the abuses it is designed to correct, is set forth in the Government's Economic Brief, Paper No. 12, pp. 82-84, filed in the administrative record of the 1937 Greater Boston milk order (App. C, pp. 1-5c), and several cases also describe its basic purpose and mechanics of operation. *Blair v. Freeman,* 370 F.2d 229 (1966); *Grant v. Benson,* 97 App. D.C. 191, 229 F.2d 765, *cert. denied,* 350 U.S. 1015; *Lehigh Valley Farmers Co-op., Inc. v. United States,* 370 U.S. 76, the latter case stating as follows:

> "The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. *But the farmer who produces the milk is protected from the effects of competition for premium outlets since he is automatically allotted a proportional share of each of the different 'use' markets.*"

Again, in *Stark v. Wickard*, 321 U.S. 288 (1944), the Supreme Court stated as follows:

> "It is apparent that serious inequities as among producers might arise if the prices each received depended upon the use the handler happened to make of his milk; accordingly, Sec. 8c(5)(B) authorizes provision to be made for the payment of a uniform price to producers for the milk delivered irrespective of the use to which the milk is put by the individual handler."

The heart of the Act is its requirement that all producers be paid a uniform price for their milk irrespective of how it is used by the handler to whom it is delivered, and this primary objective of the Act and marketwide pooling of milk has been repeatedly noted by this Court and the lower courts.

The Act's command of a uniform price to each dairy farmer irrespective of the use made of his milk is subject to one exception, in that subsection 8c(5)(D) requires that a new producer be paid during the first two months of regular delivery "at the price for the lowest use classification specified in such order." After the two months period, he must be paid the uniform price for his milk irrespective of the use thereof, and this exception to payment of the uniform price is an obviously necessary provision that protects the regular suppliers of the market from those producers who would market their milk only at opportune times in order to avoid the burden of sharing the surplus of the market. The Congressional reports specifically state that, "This is the only limitation upon the entry of new producers – wherever located – into a market, and it can remain effective only for the specified three month period." Moreover, the AAA

acknowledged that this time limitation, changed from three to two months in the conference of the House and the Senate, was the only exception to the payment of a uniform price without consideration of use of the producer's milk. (App. C, pp. 8-11c). The uniform price is subject to certain enumerated adjustments under subsection 8c(5)(B) of the Act, but these adjustments emphasize the requirement of uniformity for producers and handlers alike. Producers may deliver their milk to a plant nearer to the market center and receive the higher price paid for the milk at such location under the zone differential that involves transportation and handling charges. They may improve the grade or quality of their milk to receive the butterfat differential of the milk order. However, the nearby differential does not embrace such uniformity, in that the more distant producer may deliver his milk to the identical spot as the nearby producer and yet only the nearby producer receives the "nearby" differential. The nearby producer need do nothing to receive such payment, and the more distant producer can do nothing to receive it, other than to move the location of his farm.[6]

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[6] Subsection (D) also provides that payment at the lowest use classification or surplus price for said two months shall be "subject to the adjustments specified in paragraph (B) of this subsection." If the nearby differential is an authorized adjustment to the uniform price under (B), the new "nearby" producers would be required to receive a surplus price under (D) and also the nearby differential payments based on the fluid use of their "nearby" milk. It would be an absurdity to attribute such inconsistent and illogical reasoning to the Congress, particularly when petitioner attempts to equate the payment of Class I prices to nearby producers prior to the 1937 nearby differential as "similar differentials" and magnifies such inconsistency in so doing.

ARGUMENT

I. There Is No Important Unsettled Federal Question Or Conflict In Circuits, And The Decision Below Is Correct

The respondents respectfully submit that petitioner acknowledges the illegality of the nearby farm location differential when he equates the same with the 1936 Greater Boston milk order provision which provided for the payment of the Class I or fluid milk price of $3.30 per hundredweight for the base milk of "nearby" producers and the payment of a composite or blend price to other producers who were forced to bear the surplus of the market in such manner. Article IV of said Order, entitled "Minimum Prices", provided that the Class I minimum price was $3.30 per cwt. for milk delivered within 40 miles of Boston, and the respondents maintain that the Act clearly forbids the payment of the Class I or fluid milk price to a preferred group of producers for any reason, and particularly on the ground that such producers had received higher prices prior to the Act because of the fluid use of their milk. The referral to such an obvious violation of the Act as "similar differentials" reflects a failure or refusal to perceive the clear command of the Congress "for the payment to *all* producers . . . delivering milk to *all* handlers of uniform prices for *all* milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;". If the Congress intended to exempt the "nearby" producers from uniformity of price when it referred to "all producers", "all handlers", and "all milk", it would certainly have said so in the same plain language. The contention of petitioners that nearby producers are the sole beneficiaries of the governmental program through an apportionment of the fluid market to such preferred producers is simply untenable, whether effectuated through the nearby differential or the illegal Class I payments for "nearby" milk under the licenses and 1936 Greater Boston milk order. Moreover, such illegality is pointed up by the 1965 amendments to the Act, which provide that *all* producers are to be paid the Class I price for their "base" milk under the Class I base-rating plan authorized

under subsection 8c(5)(B)(ii)(d) of the Act.[7] The provisions of the Act relating to base-rating never authorized a scheme to apportion the fluid use market to one group of producers in a particular part of the milkshed and the burden of surplus to another group in a different area.

Petitioners note, however, that the 1936 Greater Boston order provision at least required the *delivery* of the milk of the nearby producer to a plant within the 40 mile radius of Boston. Under the present nearby differential provision, the "nearby" producer may deliver his milk 200 miles from the market center and still receive the full 46-cents "nearby" differential, but the "non-nearby" dairy farmer in the 200-mile zone may deliver his milk to the handler's doorstep in Boston without being eligible for said differential. Instead he must dig down in his pocket, in effect, and pay a part of his uniform price to an illegally preferred producer who performs no service and gives no value for the same.[8] The respondents respectfully submit that petitioners' characterization of Class I or fluid milk payments to the "nearby" producers as "premiums" or "preservation of similar differentials" when equated with the nearby differential is an admission of illegality and a fundamental violation of the very

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[7] Such a "differential" in the 1936 milk order – payment of a fluid milk price to nearby producers – could not have been ratified by the Congress without nullifying the Act at the same time. Moreover, the 1936 provision was not done *under* the Act, and it was not the same as the 1937 nearby differential which first appeared in the Boston milk order on August 1, 1937, the re-enactment of the Act having occurred theretofore on June 3, 1937. Additionally, this contention was rejected by this Court in *Brannan v. Stark*, 342 U.S. at 465-66, where the Court also made the equally applicable observation: "Nor have provisions bearing substantial similarity to those before us since been included in other milk orders so frequently as to amount to a consistent administrative interpretation of import in construing the Act."

[8] Respondents' brief in opposition to the brief *amicus curiae* of the State of Connecticut treats this subject in detail.

purpose of the Act. The entire rule and command of uniformity is devoured by the exception thereto.

The petitioner's attempt to justify the Secretary's finding in 1936 that nearby producers were entitled to Class I prices because of "the greater availability of their milk for Class I use" is totally lacking in merit. Even if this finding could be divorced from the illegal criterion of payment based on use of nearby milk, it is clear that respondents' uniform milk price could not be reduced by virtue of the availability of nearby milk. The Secretary himself found that "the inherent value of nearby milk to the market because of its *availability* and the high quality of such milk" are factors which, "to the extent that they are valid, are related to the extra value of such milk to the handler who buys it rather than to the producer generally and are, therefore, appropriate for consideration with direct-delivery differentials *payable by handlers rather than out of the pool.*" (22 Fed. Reg. 4213; App. E, p. 3e) The direct-delivery or authorized "market" differential already exists in the milk order as a part of the zone differential, and an additional differential limited to nearby producers could not be issued on the same basis. Moreover, the respondents supply the bulk of the fluid milk for the market, and an excellent article by the Assistant General Counsel, USDA, entitled, "The Pricing of Milk Under Federal Marketing Orders", 26 GW L.R. 180 (1958), illustrates the lack of merit in such "availability" argument:

> "The entire supply of milk which is approved by the health authorities for fluid use in a particular marketing area is fungible and homogenous. There is no discernable basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid market, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. *All of the milk approved by the health authorities for the fluid use in a particular marketing area is available for disposition on the fluid milk market. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared*

> *equally by all producers and distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor.*" (See also, *Nebbia v. New York*, 291 U.S. 502 (1934)

The increased frequency of voluntary sales of nearby farms for housing subdivisions or commercial development hardly denotes reliability or availability of supply. Petitioner's reference to the accessibility of nearby milk to small handlers is also lacking in merit, in that such dealers were able to procure any required supply from more distant areas at the time of passage of the Act. This Court has also noted that it was usually the small dealer who undercut the producers' milk price and failed to bear his proper share of the burden of surplus in the market. *Nebbia v. New York*, 291 U.S. 502 (1934). (See also App. E, p. 30). It cannot be seriously contended that respondents must subsidize such "small dealers" as well as the larger nearby producers, particularly when they both refuse to bear their share of the burden of surplus of the market.

Although the respondents readily acknowledge that the uniform price is subject to certain enumerated adjustments, they respectfully maintain that the petitioner's reference to production costs as a possible basis for a "nearby" differential is inappropriate and admittedly inaccurate. The utilization of this contention after it was specifically abandoned by petitioner's same counsel during oral argument in the court of appeals reflects adversely on the purpose of the desired remand, and the petitioner did not oppose the issuance of the preliminary injunction or the escrowing of the differential monies on any such basis in the district court. Moreover, the Secretary found as follows in 1957 concerning cost of production as a justification for the nearby differential:

> "Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market. Orders do not guarantee a price equal to or exceeding the cost of production,

and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials." (22 Fed. Reg. 4213).

The Secretary took this same position shortly after the passage of the Act and correctly concluded that production costs were appropriate for consideration under the general pricing provisions of the regional order pursuant to subsection 8c(18) of the Act but were not appropriate for differentials among producers affecting the minimum prices.[9] In

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[9] The petitioner also fails to note that milk and its products are exempt from the requirement of Sec. 8c(11) of the Act that limits orders to the smallest regional area, and that such matters as production costs are considered in determining the regional marketing or production area. Moreover, the colloquoy involving Sen. Copeland revolved primarily around the size of such regional area and the latter's view that his district should not be included in an arbitrary region. He was assured by Sen. Murphy that the Secretary would not do this, but he was also informed that all producers within the same region would be subject to the same terms. (App. C, pp. 5-7c). Sen. Murphy also cited the differentials that were authorized under the Act and which reflected the present practice of business, such as the location differential that provided for an adjustment for the place of delivery of the milk, in that the cost of transporting the milk to the primary market entered into the pricing of the milk. He mentioned the market differential which was paid for the direct delivery of the milk to the city plant or market and which provides a service or saving to the handler by the elimination of handling costs involved when milk was first delivered to a country plant. He mentioned the differential for grade or quality of the milk delivered and which compensates producers for a milk of a certain butterfat content. All of these items reflected the then present practice of business and to some extent relate to production costs generally, and Sen. Murphy assured Sen. Copeland that the Act provided for the same. Nearby producers are still compensated for such location value of their milk under the order, but handlers never paid an extra payment to "nearby" producers simply because of the location of their farms and there was no "nearby" differential until it was placed in the 1937 Boston order. (See App. C, pp. 24-27c)

N.Y. State Guernsey Breeders Co-op v. Wickard, (CAA 2 1944) 141 F.2d 805, *certiorari denied,* 323 U.S. 725, the Guernsey producers maintained that they were entitled to an additional differential over the butterfat differential awarded to all producers under the adjustment to the uniform price authorized for grade and quality of milk. They based their claim on the ground that said differential did not adequately compensate Guernsey producers for the greater marketability of their milk for fluid use or for the added production costs involved in producing Golden Guernsey milk. Although they were able to show that they had been "able to secure a higher-than-average Class I (fluid milk) utilization for the milk of its members" in support of their claim of greater marketability, the Second Circuit did not agree that they were entitled to payment on such basis or on the basis of such historically higher prices:[10]

> "This finally is the ultimate issue in the case – one, of course, of outstanding importance in milk regulation. It seems to us that the Secretary has correctly construed the law, and that production costs or marketability are not in themselves factors to influence minimum milk prices. For such prices it hardly seems pertinent that special allowances should be made for milk more expensively produced, or more extensively and successfully advertised, but not better in grade or quality. In a purely competitive industry factors of this kind may well affect the market price, *but when regulation by way of minimum price is substituted by reason of the very disorder of the market and its effect in impairing farmer purchasing power* (Sec. 1, 7 U.S.C.A. 601), *it is not surprising to discover no allowance for them in the governing authority.*"

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[10] Golden Guernsey producers had been awarded preferential bases under the early milk licenses for the Greater Boston milk marketing area. (See App. E, p. 1e)

Moreover, the Second Circuit noted that the "higher-than-average Class I (fluid milk) utilization" of such producers might have been due to extensive advertising, superior selling practices, *or proximity to fluid markets,* the specific inclusion of the latter factor with the other enumerated reasons indicating that the Court did not view proximity to fluid markets, or a previous higher-than-average Class I or fluid utilization as a result of such location of certain producers, as a valid reason for special treatment of such "local" or "nearby" producers.

If production costs, marketability, and public demand for certain milk, *as evidenced by a high Class I utilization prior to the Act,* cannot be the basis for compensation over the butterfat differential for grade and quality of milk because the uniform minimum price would be illegally varied thereby, a serious contention can hardly be made that the uniform minimum price can be varied by reason of the location of a producer's farm, particularly when the nearby producers are already compensated for the location value of their milk through the zone differential of the milk order.

In view of the foregoing decision by a unanimous panel of the Second Circuit and the Secretary's own findings, it is submitted that the *Cranston* district court decision is in conflict with its own circuit and is thus doubly inappropriate as a basis for requesting a writ of certiorari. Although petitioners allege that an appeal is pending in the Second Circuit in said suit, it should be noted that the *Cranston* decision was issued on August 2, 1968, and that the briefs will not be filed therein until June, 1969, thus presumably assuring that such "conflict" will be in existence when a determination is made by this Court on the petitions for the writ of certiorari. Moreover, it is clear that the *Cranston* district court decision is patently erroneous and that it actually confuses the identity of the recipient of the nearby differential with the basis for its issuance by the Secretary. That decision states that "the differentials are paid on the basis of farm location. The use made of the milk by the handler is totally irrelevant". However, the Secretary stated as follows in his 1959 Decision

promulgating the Connecticut order and nearby differential, 24 Fed. Reg. 1049 at 1063:

> "The Federal order markets in the New England and the New York-New Jersey market provide for similar differentials * * * . *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.* Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. * * * The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market *to an extent somewhat greater than would be the case under marketwide pooling.*"

Again, in 1960 at 25 Fed. Reg. 7833, the Secretary found as follows in respect to the Connecticut nearby differential:

> "As stated in the Secretary's decision of February 9, 1959 (24 F.R. 1049), the present provisions were established in recognition of the higher Class I utilization, and higher returns that nearby producers had customarily received over more distant producers."

The Secretary made the same findings in respect to the issuance of the nearby differential to producers in Massachusetts and Rhode Island, and a comparison of his findings for the different milk orders is set forth at pp. 17-18e of Appendix E. These findings openly admit that the nearby differential is a device to apportion the fluid milk price to nearby producers and that it is violative of the uniformity required under marketwide pooling and the Act. If a "differential" may be employed to obtain a larger share of the fluid milk market for nearby producers, then it is evident that such a differential predominates over the whole Act. When the issuance is grounded on the past use of a producer's milk, *then it is also evident that the illegal result has been obtained on an impermissible basis.*

Additionally, the findings as to higher returns admittedly do not refer to the period immediately preceding the passage of the Act, for the Secretary has found that prices to all producers were at depressed levels prior to the Act. Such findings as to higher prices relate solely to the use of nearby milk for fluid purposes before the advent of motor trucks, improved highways, refrigeration, etc., and the Secretary's findings in promulgating the Southeastern order and differential in 1958 clearly contradicts the petitioners' contentions that the lower court "did not fully understand the reasons for the higher prices received by nearby farmers":

> "Historically, dairy farmers in the States of Massachusetts, Rhode Island and Connecticut, because of their location with reference to the large population concentrations of New England, have disposed of a substantially larger portion of their production for fluid uses than have dairy farmers in the upcountry area. *Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market.* Under the marketwide pooling herein proposed and *without some adjustment mechanism,* the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk in the milkshed *rather than according to the utilization of his milk.* * * * " (23 Fed. Reg. 8238).[11]

Moreover, the petitioner's brief, in the *Blair* case, 370 F.2d 229 (1966), admitted that, "Nearby differentials were considered justified principally because nearby producers historically enjoyed a greater percentage of the marketwide Class I sales (*hence they received more for their milk than did producers located more distant to the center of consumption*);"

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[11] The Secretary also found that the nearby producer obtains the benefit of an established Class I price under regulation which may be higher than in the absence of regulation, and has assurance that he will not lose his market to more distant milk.

The subject of the nearby differential was exhaustively treated at the 1963 administrative hearings for the Massachusetts-Rhode Island milk order, and every witness testifying in favor of such differential grounded the same on the past use of nearby milk for fluid purposes, an illegal criterion that also acknowledges the lack of any current justification for its existence.

The correctness of the lower court's decision and that in *Blair* concerning the Secretary's inability to amend the Act by giving consideration to "historical" price relationships or preservation of the "status quo" in favor of certain producers is illustrated by the case of *H. P. Hood & Sons v. United States*, 26 F. Supp. 672, *affirmed*, 307 U.S. 588, 59 S. Ct. 1019. The district court in the *Hood* case allowed a producer to intervene for his class on the side of the handler, Hood & Sons, and a second producer was allowed to intervene on the side of the Whiting Milk Co., a handler that was also sued by the United States to enforce the milk order, 21 F. Supp. 321 (D.C. Mass. 1937). The producers' contentions concerning entitlement to the "historical" higher prices were fully considered and rejected by the district court.

The intervening producers continued in the case when it was presented to the Supreme Court, 59 S. Ct. 791, 306 U.S. 629, 83 L. Ed. 1032. Their arguments were summarily rejected by the Supreme Court with the comment in 59 S. Ct. at page 1027:

> "Other contentions are made which have been considered but they do not seem to require any statement. Affirmed."

Of especial significance is the fact that the interveners in *Hood* were non-nearby producers, the main intervener being from the State of Vermont, and this clearly indicates that many non-nearby producers also possessed preferential fluid milk outlets and higher prices prior to the Act. However, the Secretary acknowledges that the Congress did not write the legislation to retain the "status quo" and preferential price position of these producers, and it is equally clear that

the Congress did not engraft any exception of this nature in favor of a particular group of "nearby" producers.

The Supreme Court also rejected the analogous arguments of the handlers that the payment of the excess of their fluid sales over and above the uniform blended price into the producer settlement fund or marketwide equalization pool for transfer to other handlers *and the latters' producers* violated the constitutional rights of the handlers *who disposed of their milk for fluid or Class I use.* The Supreme Court noted the obvious fact that such handlers were required to pay only a minimum price according to the nature of their sales, and that they had no interest in the fund or pool to question disbursements therefrom or the uniform blended price required to be paid to all producers.

If handlers with a high fluid utilization could not pay their own producers on the basis of the excess of their fluid sales over the marketwide average price, then it is clear that producers with such "historical" fluid milk outlets[12] may not demand payment on such basis through a differential deduction from the equalization pool prior to computation of the uniform price. Either method of avoiding the Act's command of a uniform price irrespective of use would nullify the Act.

It is important to note that the arguments of handlers and those producers who received higher prices *prior to the Act* were in opposition to the equalization and uniformity required by the Act, whereas the arguments of the ineligible or non-nearby producers concerning violation of their statutory and constitutional rights are grounded *upon the Act.*

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[12] Respondents note that the "historical" boundary under the Connecticut differential is the New York Thruway, the tank truck crossing said highway numerous times to pick up milk from farms on both sides of the highway, although farmers on only one side of this relatively new thruway are eligible for the nearby differential. Such illogical bureaucratic determinations create discontent and unrest among farmers.

The latter acknowledge the constitutionality of the Act and its fundamental purpose to secure to all producers "the right to be paid a minimum price". *Stark v. Wickard,* 321 U.S. 288 (1944).

The Act provides for uniform minimum prices, not for varying non-uniform "historical" prices, and any contention concerning preservation of the "status quo" would nullify the uniform price requirement of the Act even if consideration of the use of a producer's milk did not formulate the basis for the nearby differential. Moreover, adoption of such a contention on a factual basis would result in the nearby producers receiving a surplus or Class II price for their milk, in that the Secretary found in each of his decisions promulgating a nearby differential that the nearby producers were losing their markets to distant producers and that local milk was often disposed of as surplus or manufactured milk.[13]

The respondents also respectfully submit that there is no conflict between the court below and the First Circuit when the petitioners' contentions are founded on the *dictum* in *Green Valley v. United States,* 108 F.2d 342 (1st Cir. 1939) which offered some gratuitous comments concerning the "location differential" of the aforesaid Greater Boston milk order of August 1, 1937. This case was thoroughly considered in both *Blair* and this action, and it should be noted that the action was one by the United States against handlers for enforcement of the milk order

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[13] When the transportation allowances to handlers under the order exceeded actual transportation costs by only 7 cents in the distant zones, the handlers sought to purchase their supplies from distant producers, a fact which indicates that handlers would not pay even a 7-cents premium for nearby milk. Moreover, the Secretary acknowledged that "city plant operators often have preferred to purchase milk from country sources rather than from local producers. The situation is, in fact, one of the major marketing problems dealt with in this decision because recently much of the locally produced milk has had to be disposed of in manufacturing channels." 29 FR 11208.

provisions. *No producers were involved in that case,* and the Court itself belatedly acknowledged that the handler had no standing to question disbursements from the marketwide pool or producer settlement fund. Nevertheless, the Court did make the gratuitous comment that the nearby differential was authorized under the Act as a location and market differential and stated as follows:

> "*Whatever the explanation,* this group of producers in fact commanded somewhat more favorable prices for their *fluid* milk as against producers more remotely located. The differentials now objected to were inserted in the Order *so as not to disturb the status quo in this respect.*

Initially, the plaintiffs make the point that the validity of the nearby differential was not before the Court, and the Secretary can hardly contend otherwise when the Court itself accepted the Secretary's argument to this effect.

The total error of the *Green Valley dictum* and the court's evident unawareness of the full extent of the *Hood* decision in respect to "retention of higher prices" or "preservation of the status quo" is abundantly clear, and this error is compounded by numerous other statements that reflect a cursory treatment of the question.

The Court stated that the differentials were "largely undefined" but this is obviously incorrect, for the entire Act and Congressional reports reflect the care and caution used in drafting the legislation because of the then recent cases of *Schechter Poultry Corp. v. United States,* 295 U.S. 495, and *Panama Refining Co. v. Ryan,* 293 U.S. 388. As stated by this Court in *Brannan v. Stark,* 342 U.S. at page 465:

> "With these cases specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing

orders. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 8; S. Rep. No. 1011, 74th Cong., 1st Sess. 8."[14]

The *Green Valley* court noted that nearby milk was "presumably" delivered to Boston, but the record discloses that most of it was disposed of in secondary markets. It failed to note that many "non-nearby" producers delivered to Boston, a fact which is evidenced even by the order provision which gave them the market or direct-delivery differential. It failed to realize that all producers were receiving depressed prices at the time of passage of the Act and that *non-nearby* producers with fluid milk outlets had petitioned the Supreme Court in the *Hood* case for retention of the higher prices that they had formerly received for their milk. In all fairness to *Green Valley*, however, it must be acknowledged that many of the respondents' arguments were not presented to that court. In all fairness to respondents, it can hardly be argued that they may be denied their day in court and that they can be bound by arguments advanced by the parties in those cases who have an interest adverse to the respondents. By the same token, the *dictum* of *Green Valley* may not be urged as a conflict in circuits under such circumstances.

The Supreme Court handed down the *Hood* case decision on the same day as the decision in *United States v. Rock Royal*, 26 F. Supp. 534, 307 U.S. 533 (1939), *this case also involving only handlers*, and the Court repeating in this case that handlers had no standing to question disbursements from out of the producer settlement fund. The Court referred in the case to a differential under the old New York order and stated that Sec. 8c(5)(A) of the Act pertaining to *handlers* authorized an arrangement for differential payments *by them* on milk *delivered* to plants in certain counties near the metropolitan area. The Court stated with reference to

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[14] Details of administration of the orders and Congressional program are left to the Secretary, but the extent of his statutory power is prescribed by the Act and determined by the judiciary under Art. III of the Constitution. *Stark v. Wickard*, 321 U.S. 288, 310.

the handler's contention that the preferential payments were discriminatory that, "This was found discriminatory *as between producers* by the District Court but there was no finding or conclusion of law as to any discrimination against *defendants*." The defendants in *Rock Royal* were handlers, and the issue herein was thus not before the Court in that case, but it could not be cited as authority by defendant Secretary in any event. Indeed, although the differential involved there was entirely distinct from that in the current Order or the former nearby differential in the New York-New Jersey order, it is clear that the court would have viewed as an even more serious matter any discrimination between producers *based on use of milk*, the court stating at page 580: "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be the most strongly marked."

The *Rock Royal* case is thus not authority for the nearby differential payments exacted from the respondents, and the petitioner has acknowledged that the market or direct-delivery differential should be paid by handlers rather than by producers through deductions from the marketwide pool. Moreover, respondents agree that *handlers* may pay the differential because of the service and savings effected when milk is delivered directly to the market center, and they respectfully submit that the *Rock Royal* case is in no way in conflict with the decision below. No other cases are cited by the petitioner in respect to any conflict with the decisions of this Court or other circuits, and it is clear that the petitioner could have sought certiorari after the *Blair* decision if he actually thought that the aforesaid cases supported his position. Instead he terminated the nearby differential of the large New York-New Jersey order but inconsistently refused to terminate the nearby differential in this order. This is particularly inconsistent when it is considered that his brief in *Blair*, filed as an exhibit in this case, specifically cited the Boston nearby differential as being "identical in purpose and effect" to the N.Y.-N.J. nearby differential and

"predicated on very similar findings." Such brief argues with detailed specificity the identity between the nearby differentials of the two milk orders, and his brief quoted approvingly from the definition of the "market" differential in the Congressional Reports to show that the nearby differential was a "location" differential rather than the "market" differential authorized by subsection 8c(5)(B)(ii)(a) of the Act. In fact, petitioner admitted that he had always justified the nearby differential as a location differential under subsection 8c(5)(B)(ii)(c) of the Act:

> "*Thus, dating almost to the very enactment* of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a *long-standing contemporaneous administrative construction of the Section* by the official charged with its administration is entitled to great weight."

It thus appears that the petitioner himself has rejected the *dictum* of *Green Valley* concerning justification of the nearby differential as the authorized market differential relating to the direct-delivery of milk to a city plant or market instead of initially to a country plant where double handling costs are involved. In view of this fact, the respondents respectfully submit that the citation of said case and the district court decision in *Cranston* as a basis for certiorari is clearly lacking in merit. Moreover, the latter decision completely fails to comprehend that the authorized market differential is already in the Connecticut order, just as it is in the Massachusetts Rhode Island order, as a part of the zone differential relating to transportation charges and handling costs of country and city markets or plants. The *Cranston* decision actually refuses to acknowledge the present existence of the authorized market differential in the Connecticut order when it enumerates the differentials contained therein, and it then proceeds to hold that no such market differential ever existed as defined in the Congressional Reports. Such a differential also existed in the very secondary

market in which that court sat and in which those plaintiffs are located, the schedule of such "customary market differentials" being set forth at pages 22-23c of App. C with related material at pages 12-22c that illustrates the total inaccuracy of the testimony of the interested witnesses upon which the *Cranston* district court relied.

The respondents respectfully submit that the *Cranston* district court decision is also in conflict with its own circuit in respect to the principle enunciated in *Kass v. Brannan,* 196 F.2d 791, and *Knudsen Bros. Dairy v. Freeman,* 303 F.2d 886 (a Connecticut case), and by this Court in *Lehigh Valley Farmers Cooperative v. United States,* 370 U.S. 76, involving a similar differential payment.

In the *Lehigh Valley* case, the Supreme Court declared illegal the "compensatory payments" provision of a milk order which required a handler to make such payments into the Producers Settlement Fund when he brought "outside" milk into the region for sale as Class I or fluid use, the Court stating:

> "As has been noted, the sale for fluid use of nonpool milk in the marketing area displaces pool milk that might otherwise be used for the premium outlet. * * * A close examination of the workings of the present compensatory payment provision reveals that its effect is to preserve for the benefit of the area's producers the blend price which they would receive if all outside milk were physically excluded and they alone would supply the fluid milk needs of the area. For every cwt. of pool milk that is forced into 'surplus' use by the entry of nonpool milk, the handler introducing the outside milk is required to pay for the benefit of the area's producers the difference between the value of pool milk would have had if the nonpool milk had never entered and the value it has once the nonpool milk is sold for fluid use. *In effect, therefore, the nonpool milk is forced to subsidize the pool milk and insulate the pool milk from the competitive impact caused by the entry of outside milk.* This was recognized by the

> Court of Appeals which held that such a compensatory payment was '*designed to compensate the pool for the loss of the Class I fluid milk utilization.*' * * * Along with enumerating the powers granted to the Secretary of Agriculture so as to avoid the 'delegation' problems brought to light by the then recent case of *Schechter v. United States,* 295 U.S. 495, the Congress sought in 1935 to limit the Secretary's powers so as to prevent him from establishing 'trade barriers.' * * * that history likewise makes it clear that as regards milk the word 'prohibit' refers not merely to absolute or quota physical restrictions, *but also encompasses economic trade barriers of the kind effected by the subsidies called for by this 'compensatory payment' provision.*" (Emphasis supplied)

The payments in *Lehigh* were made by *handlers* for the laudable purpose of protecting *all* producers whose milk was regulated under the regional order, and the payments were required only in those months in which surplus milk exceeded 15 percent of the total pool milk. The nearby differential payments, however, benefit only a minority of producers and constitute an injury to the majority of *regular* suppliers of the market who must bear the burden of surplus through such device. The non-nearby milk is being used to subsidize nearby milk, and the nearby producer is insulated from competition for the fluid milk market by virtue of the nearby differential payments. They constitute a burden on interstate commerce, interfere with the free flow of commerce between States, and amount to an illegal duty or tax on every hundredweight of milk produced and sold by non-nearby dairymen, the economic market barrier erected thereby being equal in degree to such tax or subsidy.[15]

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[15] The decisions of this Court in *Baldwin v. Seelig,* 294 U.S. 511, *Dean Milk Co. v. Madison,* 340 U.S. 349, *Hood & Sons v. DuMond,* 336 U.S. 525, and *Polar Co. v. Andrews,* 375 U.S. 361, emphasize the inability of the Secretary to promulgate such discriminatory differentials.

The respondents respectfully submit that there is no conflict that would warrant issuance of the writ, and that the petitioner's attempt to create an ambiguity in respect to the plain language of the Act concerning uniformity of price irrespective of use is completely devoid of merit. The contention that nearby producers may receive payment based on the past use of nearby milk is clearly untenable, and to contend that the current payments on such basis are not prohibited because the present use of nearby milk is not considered in making such differential payments is totally unsound and illogical. Although petitioner states that there is no necessity for extensive discussion of the merits, it is obvious that this is because of the lack of merit in such contentions, and respondents note that his petition contains all prior arguments to the courts below.

The disbursement of the respondents' escrowed funds by the district court without further delay is imperative if additional irreparable injury is not to be sustained by the respondents. The petition must be denied for this reason and because of the complete lack of merit in petitioners' contentions, his own arguments virtually assuring the chaotic and disorderly marketing that would occur in every regional order if the nearby differential is judicially validated. It would open the floodgates for the issuance of similar discriminatory price preferences based upon political expediency and group pressures, thereby reviving all of the cutthroat competition that gave rise to the passage of the Act and effectively nullifying its very purpose and policy.

Moreover, the petitioner refused to apply for certiorari after the *Blair* case, and 35,000 dairymen in that market and thousands of others throughout the country have likewise accepted the fact that such differentials are illegally discriminatory and unauthorized under the Act. The present petition amounts to a belated application for review of that decision, and only confusion and uncertainty among dairy farmers would result from the granting of the writ. Lack of confidence in the administrative process would also ensue if

the case was now remanded for any reason, for this differential was exhaustively considered from its very beginning during the 1963 promulgation hearings and the Secretary's own committees have recommended its abolishment without success. No valid reason was ever established for the nearby differential after exhaustive consideration by the Secretary, and remand would actually constitute a denial of legal counsel under the contemplated procedure and preclude any future challenge to petitioner's authority by grass-roots farmers. The Court below astutely noted that remand to the agency was desired for no proper purpose, and the district court should oversee the prompt disbursement of the escrowed monies directly to respondents in conformity with the records maintained for such purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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